COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH COUNTY

APPEALS COURT
NO. 2017-P-0494

COMMONWEALTH,
Appellant

VS.

JEROME ALMONOR,
Appellee

ON APPEAL FROM JUDGMENTS OF
THE BROCKTON SUPERIOR COURT

BRIEF FOR THE COMMONWEALTH

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III. Did the Motion Judge err by finding that lawful consent of the legal resident of the dwelling was not attenuated from any error in obtaining CSLI?

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PROCEDURAL HISTORY

The defendant was indicted by a Plymouth County Grand Jury on September 21, 2012 for murder (M.G.L. c. 265 s. 1), two counts of armed assault with intent to rob (M.G.L. c. 265 s. 18(b)), unlawful possession of a sawed off shotgun (M.G.L. c. 269 s. 10(c)), unlawful possession of ammunition (M.G.L. c. 269 s. 10(h)(1)), assault by means of a dangerous weapon (M.G.L. c. 265

s. 15A), and intimidation of a witness (M.G.L. c. 268 s. 13B), stemming from the shooting death of Lonnie Robinson in the city of Brockton on August 10, 2012. (Com. R. 3-19)[1]. The defendant filed a motion to suppress a sawed-off shotgun and a bullet proof vest that were located with him in a room at 18 Clarence Street in Brockton[2]. (Com R. 20-32). An evidentiary hearing was held over multiple dates before the motion Judge, Moriarty, J.. (Com. R. 10-19). On September 8, 2016, the motion Judge allowed the defendant's motion to suppress the evidence seized. (Com. R. 69-94). The Commonwealth filed its application to a Single Justice pursuant to Mass. R. Crim. P. 15(a)(2) on December 12, 2016, after seeking an extension to file the appeal from the Superior Court. (Com. R. 95-97). On February 24, 2017, the Single Justice allowed the Commonwealth's petition. (Com. R. 95-96, 99-100).

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[1] The Commonwealth's Record Appendix will be cited as (Com. R. page). The motion hearing transcript will be cited as (date, page).

[2] The defendant also moved to suppress statements he made subsequent to his arrest. That portion of his motion was denied. The defendant appealed to a single justice pursuant to Mass. R. Crim. P. 15(a) (2) which was also denied. (Com. R. 101-102).

STATEMENT OF THE FACTS

The Commonwealth adopts the findings of fact by the motion judge as articulated in his written decision:

"On August 10th, 2012, at approximately 5:19 pm., Brockton Police Officer James E. Smith ("Smith") was dispatched to 63 Perkins Street in Brockton on a report that a party had been shot. 63 Perkins Street is a multifamily dwelling located in a mixed residential and commercial area. Smith, one of numerous officers dispatched to the residence, encountered a chaotic scene upon arrival. He quickly observed a black motor vehicle in the driveway, an unconscious male inside and blood running down the driveway. Smith observed that the male, later identified as Lonnie Robinson ("Robinson"), had suffered a gunshot wound to his chest.

At approximately 8:15 p.m., Massachusetts State Police Trooper Daniel Harrington ("Harrington") and Brockton Police Detective Christopher McDermott ("McDermott") interviewed Fuller[3]. Fuller told Harrington that he had been in the car with Robinson

parked in the driveway of 63 Perkins Street when a second vehicle pulled up behind them. Two black men left their vehicle and entered the house. Approximately two minutes later, the men exited and walked by Fuller's vehicle. One of the men, later identified as Almonor, engaged in an unfriendly exchange with Robinson. Within seconds, he pulled a firearm from his pants and told Robinson and Fuller to "run (empty) your pockets." The second man, later identified as Tassy, walked up to the car and told Almonor, allegedly referring to Robinson, that he would have "popped him already." After some verbal jawing back and forth, Almonor shot Robinson in the chest. Tassy and Almonor then jumped in their car and left the scene.

Although it was raining heavily, Fuller said he had a clear view of the shooter who was approximately ten feet away. He described the shooter as short, with a skinny build, sporting dreadlocks and a scruffy little goatee. He wore shorts and other dark colored clothing. Fuller described the firearm as wrapped in tape.

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[3] Fuller refers to Derek Fuller who the motion Judge references in the introduction of his memorandum as an

Fuller was asked if he could make and identification of the shooter and he responded he could. McDermott read to him from a "Witness Instruction Form" which provided as follows:

> 'In a moment I'm going to show you a group of photographs/individuals. The group of photographs may or may not contain a picture of the person who committed the crime now being investigated. It is just as important to clear innocent people from suspicion as it is to identify the guilty. Regardless of whether or not you are making an identification, the police will continue to investigate the case. After you are done I will not be able to provide you with any feedback or comments on the results of this process. Do not inform other witnesses that you have or have not identified anyone. Think back to the time of the event, the place, view, lighting, your frame of mind etc. take as much time as you need. Keep in mind that individuals may easily change hairstyles, beards and moustaches. If you recognize anyone as you look at the photographs/individuals, please tell me which photograph/individual you recognize. In your own words tell me how you know the person and how sure you are of the identification'.

He was then shown a photographic array which contained Almonor's photograph and the images of seven other dark skinned males of similar age and appearance. Fuller intently studied the array for approximately 45 seconds. After some pause, he pointed to Almonor's photograph and said, with some

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eye witness. (Com. R. 69).

hesitation: "it looks like him to me right there." At the request of the police, Fuller then circled and initialed the photograph.

Fuller's identification of Almonor was something less than unequivocal. He requested to view the array again but was denied the opportunity. He was not asked to express his degree of certainty about his identification[4].

The police did not pressure Fuller to make a selection from the photographic array, or tell him that anyone in the array depicted the suspect. There was nothing about the photographs in the array that particularly singled out Almonor and no evidence that either officer suggested or otherwise emphasized his photograph.

At approximately 9:10 p.m., Harrington, along with Brockton Police Detective Thomas Hyland ("Hyland"), met with Tassy in a private room. During that conversation, Tassy admitted that he was present at the scene. Harrington asked Tassy if he knew Almonor. He admitted that he knew him as LT and that

[4] The defendant had also filed a motion to suppress this identification. The evidence for that motion was taken during the same evidentiary hearing. These

he had spoken to him earlier in the day by phone. Tassy told Harrington that Almonor was listed in his cell as "305". He showed the number, 774-826-7398, to Harrington, who wrote it down.

At approximately 11:00 p.m., Massachusetts State Police Trooper Joseph Kalil ("Kalil") made an emergency request for telephone information from Sprint/Nextel for phone number 774-826-7379, the number provided by Tassy earlier in the evening. Kalil requested that Sprint/Nextel provide him with: (1) Subscriber information (2) Call detail records with cell site information (within the past week) (3) Historical Location Information PCMD (within the past fourteen days); and (4) Precision Location of mobile device (GPS Location). Kalil described the exigent circumstances as follows: "outstanding murder suspect, shot and killed victim with shotgun. Suspect still has shotgun." Neither Kalil nor Harrington ever contemplated procuring a search warrant for the cell site location information location because they did not believe they were required to.

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findings are related to the motion Judge's denial of that motion. (Com. R. 10-19).

Sprint/Nextel did not immediately respond and as result, Kalil, approximately one hour later, telephoned a representative of the carrier, who provided Kalil with the real time latitude and longitude coordinates of the location of the cell phone. Kalil entered the information into Google Maps and learned that the coordinates corresponded to the general location of Clarence Street in Brockton. Since the police had earlier in the investigation learned that Almonor's ex-girlfriend, Gina Philemond, resided at 18 Clarence Street in Brockton, they quickly deduced that Almonor was likely there.

Approximately thirty minutes later, a contingent of police officers descended upon 18 Clarence Street and announced their presence. The owner of the house, Liautad Philemond answered the knock on the door. State Police Lieutenant Leonard Coppenrath ("Coppenrath") asked Philemond if he knew an individual by the name of LT and if he was there. Mr. Philemond indicated that he knew LT but did not believe he was home. He allowed that his daughter Gina should be upstairs in her room and gave the police permission to go upstairs and inquire.

When the police arrived on the second floor they noticed two bedrooms. In one of the bedrooms they found a man sleeping. After determining that individual was not LT, they went to the closed door of a second bedroom. Coppenrath knocked on the door several times and ordered anyone inside to come out. Police heard a male voice from inside utter an expletive. Almonor eventually opened the door, backed away and complied with an order to lie on the floor as the police entered.

Inside the room, Harrington observed in plain view a sawed off shotgun protruding from an open dresser drawer and a bullet proof vest on the floor. Almonor was arrested, read his *Miranda* rights and taken to the Brockton police station where he was interviewed at approximately 1:30 a.m. During the course of the interrogation, Almonor made several incriminating statements." (Com. R. 69-94).

ARGUMENT

I. THE MOTION JUDGE ERRED BY FAILING TO APPLY THE SIX HOUR EXCEPTION TO THE WARRANT REQUIREMENT.

The Six Hour Exception

In the case at hand, the police did not need a warrant for the defendant's CSLI because they only

obtained a short span of CSLI information, less than an hour, perhaps even minutes according to the Motion Judge's findings. (Com. R. 82-83). In 2014, the Supreme Judicial Court set forth a new rule that requires law enforcement to obtain a search warrant based on probable cause to obtain cell site location information ("CSLI") that exceeds six hours. Commonwealth v. Augustine, 467 Mass. 230, 255, n. 37 (2014). Prior to that ruling, police were able to obtain such data upon a showing that "there are reasonable grounds to believe that the ... records or other information sought, are relevant and material to an ongoing criminal investigation." 18 U.S.C. § 2703(d).

Although the type of CSLI at issue in Augustine was historical, the Court recognized that "in terms of the constitutional question raised, real-time CSLI and historical CSLI are linked at a fundamental level: they both implicate the same constitutionally protected interest - a person's reasonable expectation of privacy - in the same manner — by tracking the person's movements." Id. at 254. However, the Court in Augustine reasoned that "short-term GPS vehicle tracking by the government is similar to visual

surveillance, a traditional law enforcement tool that does not implicate constitutionally protected privacy interests." Id. While recognizing the difference between registration (real-time) and historical (telephone) CSLI[5], the Augustine Court found that their similarities dictate that the length of duration of the tracking will be relevant in the consideration of a person's reasonable expectation of privacy in his or her CSLI and that there is some period of time for which a person's CSLI may be obtained that is too brief in duration to implicate the person's reasonable expectation of privacy. Id. 254-55. Some periods may be so brief that it cannot be reasonably expected that

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[5] In his dissent, Justice Gants describes the difference between the two types of CSLI: "Telephone call CSLI ... provides the approximate physical location (location points) of a cellular telephone *only* when a telephone call is made or received by that telephone. Registration CSLI ... provides the approximate physical location of a cellular telephone every seven seconds unless the telephone is "powered off," regardless of whether any telephone call is made to or from the telephone. Telephone call CSLI is episodic; the frequency of the location points depends on the frequency and duration of the telephone calls to and from the telephone. Registration CSLI, for all practical purposes, is continuous, and therefore is comparable to monitoring the past whereabouts of the telephone user through a global positioning system (GPS) tracking device on the telephone, although it provides less precision than a GPS device regarding the telephone's location." Commonwealth v. Augustine, 467 Mass. 230, 258-59 (2014).

such imprecise and isolated pieces of data will provide any clear and meaningful understanding of a person's comings and goings in public and private places. See Id. at 251.

Here, the police obtained one set of latitude and longitude coordinates for the cell phone in question at approximately midnight. (2/12/16-p.15-16). Those coordinates only told investigators that the phone was located somewhere between 2 and 66 Clarence Street in Brockton. (1/28/16-p.70-71). By 12:50 A.M., the police, using independent information they had received from a witness to narrow their search, were knocking on the door of 18 Clarence Street, where the defendant was ultimately located. (1/28/16-p.71-73). There was no information presented by the defendant (either at the hearing or by way of affidavit) that he was inside the private residence where he was later located by the police at the moment his cell phone's latitude and longitude coordinates were obtained. Even absent exigent circumstances, as we have in this case, the defendant does not have a reasonable expectation privacy in his CSLI that was obtained once at midnight "because the duration is too brief to implicate the person's reasonable privacy interest." Id. at 254.

Therefore the police did not need to obtain a warrant to secure that data.

Although Augustine specifically involves the use of historical CSLI, the Court implied that real-time, or registration CSLI, like the kind obtained in this case, can be far-less intrusive than historical CSLI. "Short-term GPS vehicle tracking by the government is similar to visual surveillance, a traditional law enforcement tool that does not implicate constitutionally protected privacy interests ... But, as the motion judge [in Augustine] observed, when the government obtains historical CSLI from a cellular service provider, the government is able to track and reconstruct a person's past movements, a category of information that *never* would be available through the use of traditional law enforcement tools of investigation. Furthermore, as discussed previously, cellular telephone location tracking and the creation of CSLI can indeed be more intrusive than GPS vehicle tracking." Id. at 254.

Other Courts have found that the Augustine exception applies to so-called "real time" or "transactional" CSLI like the type obtained in the present case. The Augustine holding implicitly

indicates that CSLI may be used to facilitate the execution of an arrest warrant. Commonwealth v. Streety, No. CRIM.A. 2013-1261, 2014 WL 3375673, at 13 (Mass. Super. Apr. 23, 2014). Although no arrest warrant was present, the Court in Streety found that its holding applies in cases where there is an exception to the warrant requirement, as argued in this case. Unlike the present case, the police in Streety obtained significantly more transactional CSLI, fourteen hours, to locate the defendant.

The Augustine reasoning was reinforced in Commonwealth v. Estabrook, 472, Mass. 852, 858 (2015) where the Supreme Judicial Court held that "assuming compliance with the requirements of 18 U.S.C. § 2703, *the Commonwealth may obtain historical CSLI for a period of six hours or less relating to an identified person's cellular telephone from the cellular service provider without obtaining a search warrant*, because such a request does not violate the person's constitutionally protected expectation of privacy." Id. (emphasis added). Although footnote 12 in Estabrook declined to extend the now bright-line rule to registration (real time)CSLI, citing the dissent in Augustine, the reasoning in the majority decision in

Augustine, discussed above, leaves the same analysis to be made regarding one's expectation of privacy, namely that the duration can be so brief as to not implicate ones reasonable privacy interest. Augustine, supra at 254. "[I]t is only when such [electronic] tracking takes place over extended periods of time that the cumulative nature of the information collected implicates a privacy interest on the part of the individual who is the target of the tracking." *Id. at* 253, citing U.S. v. Jones, 132 S.Ct. 945, 955 (2012) and Commonwealth v. Rousseau, 465 Mass. 372 at 382. An isolated sampling of a person's general location can hardly track the particular pattern of his movements from which law enforcement could piece together an intimate picture of the individual's daily life. Id. at 251. Here, where the police obtained far less than the six hour window of information permissible in Augustine, the motion judge erred as a matter of law by suppressing the evidence.

The motion Judge focused not on the length of time of the tracking, as discussed in Augustine, but rather on the fact that when the defendant was located, he was in a private residence. The Court in Augustine had already contemplated and discussed the

concerns with cell phone tracking and its ability to go into places where, generally, car GPS tracking cannot. Id. at 252-253. Yet despite these trepidations, that Court still reached the conclusion that ultimately, it is the "cumulative nature," or length of time the government tracks ones movement that will implicate the privacy interest. Id. at 253 See United States v. Maynard, 615 F.3d 544, 562 (D.C. Cir. 2010), aff'd sub nom. United States v. Jones, 132 S. Ct. 945 (2012); Rousseau, supra at 382. This rationale has been extended to the context of CSLI. See, e.g., In re Application for an Order II, 809 F. Supp. 2d at 122; In re Application of the U.S. for an Order Authorizing the Release of Historical Cell Site Info., 736 F. Supp. 2d 578, 590 (E.D.N.Y.2010). See also In re Application of the U.S. for an Order Authorizing the Release of Historical Cell-Site Info., U.S. Dist. Ct., No. 11-MC-0113 (E.D.N.Y. Feb. 16, 2011) (discussing "length of time over which location tracking technology must be sustained to trigger the warrant requirement" and ultimately concluding that length of tracking matters to constitutional analysis).

Not only was the time period that the officers obtained the phone's CLSI brief, but it was imprecise. Another factor that this Court has and should consider when determining whether the defendant's privacy rights were violated is the accuracy of the tracking. See Commonwealth v. Collins, 470 Mass. 255, 270 (2014). (Upholding police action without a warrant when law enforcement sought and obtained repoll numbers, also known as switching center information, where that information only provided "general area" where a cell phone is in use and distinguishing this privacy invasion from the type of detailed CSLI information discussed in Augustine.) Here, the one-time procurement of the cell phone's CSLI only told investigators that the phone was somewhere between 2 and 66 Clarence Street in Brockton, hardly a precise location. (1/28/16-p.70-71). While the repoll data discussed in Collins can cover an area of up to 100 miles, Id. at 269, the differing precision of the technologies available to law enforcement should be part of the analysis when balancing the defendant's privacy rights against the legitimate needs of law enforcement to, as in this case, locate and apprehend a murder suspect still at large.

II. THE MOTION JUDGE ERRED BY FAILING TO APPLY THE EXIGENCY EXCEPTION TO THE WARRANT REQUIREMENT.

The defendant alleges the Commonwealth improperly and unlawfully obtained real-time CSLI from a cell phone in the defendant's possession because it did so without a search warrant. Under the Federal Stored Communications Act, service providers are permitted to disclose those records voluntarily only in certain limited circumstances. See 18 U.S.C. § 2702(c)(1)-(6). One such circumstance is when "the provider, in good faith, believes that an emergency involving danger of death or serious physical injury to any person requires disclosure without delay of information relating to the emergency." 18 U.S.C. § 2702(c)(4), otherwise known as exigency. Factors which tend to support a finding of exigency include (1)a showing that the crime was one of violence or (2) that the suspect was armed, (3) a clear demonstration of probable cause, (4) strong reason to believe that the suspect was in the dwelling, and (5) a likelihood that the suspect would escape if not apprehended. Commonwealth v. Forde, 367 Mass. 798, 807 (1975).

The motion judge found that the Commonwealth satisfied the first three factors for determining

exigency. (Com. R. 88). This finding is supported by the record. The police were investigating a brazen, fatal, daytime shooting in a residential neighborhood (1/28/16-p.18) conducted with a sawed-off shotgun (1/28/16-p.39). The shooter was still at large (1/28/16-p. 65-66) and less than six hours had passed from the time of the shooting until the time when the request based on exigency was made to Sprint/Nextel. (2/12/16-p.9). The state of the evidence at the time of the request demonstrated that probable cause existed to believe that the defendant, Mr. Almonor, had committed the murder since he was identified by five separate witnesses as the perpetrator either directly or circumstantially. (Com. R.45-66).

However, the motion Judge incorrectly found that the Commonwealth had to present evidence, absent the CSLI, that the defendant was in the home and the Commonwealth presented no evidence that the gun would be lost or destroyed if the police didn't take immediate action. (Com. R. 88). These findings are not supported by the case law and record. As discussed above, the CSLI only provided the police with a general street location for the defendant, and it was their independent investigative work that brought them

specifically to the defendant's girlfriend's home. (1/28/16-p.70-73). Once there, the police obtained lawful consent to enter the home from the homeowner who stated he knew the defendant but did not believe he was in his home at that time. (1/28/16-p. 77)(see infra). The police did not use the exigency exception to the warrant requirement to unlawfully enter a private home, as discussed in Forde, supra at 805-806, they used the exigency exception to obtain the CSLI and therefore were not required to show a strong reason to believe the suspect was inside the home.

Likewise, the police did not have to show a reasonable belief that the gun would be removed or destroyed to satisfy the exigency factors, the exigency existed because of the real possibility of losing the location of the armed, fleeing murderer if he shut down his phone. The Troopers were aware that the phone could be powered down and they could lose all information about its location. (1/28/16-p.136). Given the nature of the crime and the state of the evidence, and the possibility that they could lose location information, and thus the whereabouts of a violent and armed murderer, there were exigent circumstances that justified the request to

Sprint/Nextel and the response from Sprint/Nextel without first sitting down to write and obtain a warrant, which would have been impractical.

Recently, the Supreme Judicial Court found that a service provider's good faith, voluntary disclosure of phone records in exigent circumstances does not violate the Federal Stored Communications Act. Commonwealth v. Chamberlin, 473 Mass. 653, 657 (2016). In Chamberlin, the law enforcement officer sent the provider a letter stating that the defendant, a customer of the service provider, was a suspect in a shooting incident and had threatened the victim's family. Id. Here, Trooper Kalil sent a request to Sprint/Nextel that stated "outstanding murder suspect, shot and killed victim with shotgun. Suspect still has shotgun." (2/12/16-p.8 & Com. R. 67-68). Sprint/Nextel, like the provider in Chamberlin, had a good faith belief that exigent circumstances justified disclosing the defendant's records under Federal Stored Communications Act to the State Police, and disclosed those records voluntarily. Id.

Courts have long upheld various exigencies as exceptions to the warrant requirement in numerous types of situations. "[T]he inherent mobility of an

automobile creates an exigency that they, and the contraband there is probable cause to believe they contain, can quickly be moved away while a warrant is being sought." Commonwealth v. Motta, 424 Mass. 117, 123 (1997) (citations omitted). One such exigent circumstance is the threat of imminent loss of evidence. See generally Cupp v. Murphy, 412 U.S. 291, 296 (1973); Commonwealth v. Skea, 18 Mass. App. Ct. 685, 697 (1984). When police officers acting on probable cause reasonably believe that evidence or contraband will imminently be destroyed, exigent circumstances justify a warrantless entry and search of the premises. United States v. Edwards, 602 F.2d 458, 468-469 (1st Cir. 1979). Commonwealth v. Amaral, 16 Mass. App. Ct. 230, 233 (1983). "One recognized exception to the warrant requirement is the 'emergency aid' exception, 'which permits the police to enter a home without a warrant when they have an objectively reasonable basis to believe that there may be someone inside who is injured or in imminent danger of physical harm.'" Commonwealth v. Entwistle, 463 Mass. 205, 213 (2012). One of the exceptions to the warrant requirement of the Fourth Amendment to the United States Constitution is exigent circumstances that make

it impracticable for authorities to obtain a warrant while the hazardous situation continues to exist. See, e. g., Commonwealth v. Young, 382 Mass. 448, 456-457 (1981); Commonwealth v. Franklin, 376 Mass. 885, 898-900 (1978); Forde, supra at 800-803.

Based on all the facts and circumstances known to investigators at 11 P.M. on August 10, 2012, the police acted reasonably when they requested, without first applying for a search warrant, the location coordinates for the defendant's phone. Given the type of crime they were investigating, the weapon used and the knowledge that the location information would be undetectable immediately upon the target phone being powered off, the police acted reasonably. The motion judge's factual finding that no exigency existed is clearly erroneous because it is contradicted by the evidence of a daytime shooting and murder using a sawed off shotgun.

III. THE MOTION JUDGE ERRED BY FINDING THAT LAWFUL CONSENT OF THE LEGAL RESIDENT OF THE DWELLING WAS NOT ATTENUATED FROM ANY ERROR IN OBTAINING CELL SITE LOCATION INFORMATION.

Although the Commonwealth maintains that the search was lawful and valid based on the above arguments, even if the Court found that the absence of

a warrant to obtain the CSLI was impermissible, the subsequent seizure of contraband (sawed-off shot gun/vest) and statements of the defendant was properly obtained. "When consent to search is obtained through exploitation of a prior illegality, particularly very close in time following the prior illegality, the consent has not been regarded as freely given." Commonwealth v. Midi, 46 Mass. App. Ct. 591, 595 (1999). Evidence gathered during a search brought about by such compromised consent is considered tainted by the illegality and is, therefore, inadmissible. Ibid. If, however, there is attenuation between the prior illegality and the consent, the consent is cleansed of the effect of the prior illegality and is deemed valid. See Brown v. Illinois, 422 U.S. 590, 603-604 (1975); Commonwealth v. Yehudi Y., 56 Mass. App. Ct. 812, 817 (2002). The courts take this to mean that consent is valid if it can rationally be determined that it did not come about by virtue of the prior illegality, but rather was given for reasons independent of the earlier unlawful act or event. New York v. Harris, 495 U.S. 14 (1990); Commonwealth v. Marquez, 434 Mass. 370, 378 (2001),

Commonwealth v. Kipp, 57 Mass. App. Ct. 629, 633 (2003).

Attenuation can occur by reason of lapse of time, intervening circumstances or a disconnection between the prior illegality and the person giving consent, and it is the Commonwealth's burden to prove that adequate attenuation has taken place. Midi, supra. "In determining whether evidence obtained after [a constitutional] violation must be suppressed, the issue is not whether 'but for' the prior illegality the evidence would not have been obtained, but 'whether ... the evidence ... has been come at by exploitation of [that] illegality or instead by means sufficiently distinguishable to be purged of the primary taint." Commonwealth v. Damiano, 444 Mass. 444, 453 (2005), quoting Commonwealth v. Bradshaw, 385 Mass. 244, 258 (1982).

The Supreme Judicial Court has looked to four factors set out in Kaupp v. Texas, 538 U.S. 626, 633 (2003) to help establish guidelines for determining whether the Commonwealth has satisfied the attenuation principal. Damiano, supra at 455. They include (1) temporal proximity, (2) intervening circumstances, (3) observance of the Miranda Rule subsequent to the

unlawful arrest[6] and, (4) purpose and flagrancy of the official misconduct. Id.

In the present case, the police used independent information from a named witness that the defendant had a girlfriend who resided at 18 Clarence Street. (1/28/16-p. 64, 71). Once they arrived there, they knocked at the front door and were greeted by the homeowner. (1/28/16-p. 73, 76). The police did not tell the homeowner about the location information they had received. (1/28/16-p. 77). The homeowner, believing that the defendant was not there, but that his daughter was home and could likely provide the police some additional information about the defendant's whereabouts, allowed police to enter his home, both verbally and through his actions. (1/28/16-p. 77).

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[6] The facts in Damiano, supra, involve the police relying on intercepted communication between the defendant and his co-conspirator to arrest Damiano and search his person, resulting in the discovery of marijuana. After his arrest and Miranda warnings, Damiano gave statements to the police. The Court found that the search of Damiano was impermissible and thus the marijuana must be excluded since the probable cause to arrest him came almost exclusively from the intercepted phone call. However, applying the attenuation standard, the Court found the statements at the station were admissible since they were not derived from the illegal interception.

Police located a locked door at the top of the stairs after observing that the daughter was not in the only other room on the second floor. (1/28/16-p. 79). The homeowner told police that the door should not be locked. (1/28/16-p. 79). Still, the police continued to knock and announce their presence. (1/28/16-p. 80). They heard what appeared to be a male voice say, "oh shit," on the other side of the door. (1/28/16-p. 80). The defendant opened the door and complied with the police instructions to show his hands. (1/28/16-p. 80-82).

While conducting a brief protective sweep of the room for any other persons present, police observed, in plain view, a sawed-off shot gun and a bullet proof vest. (1/28/16-p. 82-83). They secured the residence and obtained a search warrant based on probable cause to search the home. (1/28/16-p. 87). The contraband was not touched or collected until the warrant was granted. (1/28/16-p. 83). The defendant was taken into custody, Mirandized more than once, and gave a recorded statement to police at the station. (1/28/16-p. 83-84, 88).

Looking to each of the Damiano factors, first, the seizure of the contraband came after the

application for a search warrant. If you excise from the affidavit to support the search warrant, everything after the police requested the CSLI, there is still probable cause to search the home for the defendant and contraband. However, the plain sight viewing of the contraband was done when the police were in a place that they were legally allowed to be present because of the homeowner's voluntary consent to enter his home and thus should also be considered when evaluating the application for the search warrant. Police may conduct a warrantless search with the free and voluntary consent of a person possessing the ability and apparent authority to consent. See Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973); Commonwealth v. Ortiz, 422 Mass. 64, 70 (1996). Whether consent is free and voluntary is to be determined from all of the circumstances. Commonwealth v. Barnes, 20 Mass. App. Ct. 748 (1985).

The Commonwealth has the burden of demonstrating that the consent was "unfettered by coercion, express or implied, and also something more than mere 'acquiescence to a claim of lawful authority.'" Commonwealth v. Voisine, 414 Mass. 772, 783 (1993), quoting from Commonwealth v. Walker, 370 Mass. 548,

555, cert. denied, 429 U.S. 943 (1976). The consent given by Mr. Philemond was not the product of an exploitation of any illegality because of the independent information about the defendant's girlfriend's address and the fact that Mr. Philemond, the lawful resident, was never told about the CSLI data. His consent, therefore, could not have been influenced by the CSLI data, even if it were unlawfully obtained. Midi, supra at 595.

The statements made by the defendant were made back at the police station after multiple valid Miranda waivers and thus also sufficiently separate in time from the CSLI data and his arrest. Bradshaw, supra (confession not tainted by illegal arrest where defendant given Miranda warnings twice before confession, and over an hour elapsed before statement made).

Second, there were many intervening circumstances that would remove the taint if this Court found that the CSLI was obtained improperly. They include the independent information about the defendant's potential whereabouts, the consent to search, and the search warrant itself, all discussed above. Likewise, the third factor, the observance of the Miranda Rule

has also been discussed above and was adhered to in this case.

IV. THE DEFENDANT DOES NOT HAVE STANDING TO CHALLENGE THE SEARCH OF THE BEDROOM BECAUSE HE DID NOT DEMONSTRATE THAT HE HAD A RESONABLE EXPECTATION OF PRIVACY.

A defendant generally has automatic standing to challenge a search resulting in the discovery of a firearm where is he charged with possession of the firearm. A defendant does not however have automatic standing to challenge items found in a place where they do not have a recognized expectation of privacy when the items do not result in charges of a possessory nature. Commonwealth v. Mubdi, 456 Mass. 385, 392 (2010), Commonwealth v. Colon 449 Mass 207, 213 (2007); cert denied, 552 US 1079. (defendant did not have reasonable expectation of privacy in girlfriend's apartment). Mubdi also sets an exception to the automatic standing rule. A defendant does not have standing to challenge a search where they had no right to be in the house or automobile where evidence was found. Mubdi, supra at 393, n.8. The Supreme Judicial Court expanded this premise in Commonwealth v. Carter, finding it inappropriate to permit a person fleeing from police to rely on article 14 to suppress

evidence found on a third person's property. Commonwealth v. Carter, 424 Mass. 409, 412 (1997).

As previously stated, the homeowner did not believe that the defendant was inside the home. (1/28/16-p. 77). When police approached the second floor bedroom belonging to the homeowner's daughter, the door was locked. (1/28/16-p. 79). The homeowner told police that the door should not be locked. (1/28/16-p. 79). The defendant was found hiding in a second floor bedroom. (1/28/16-p. 80-82). The homeowner's daughter was not present. (1/28/16-p. 82). The defendant presented no evidence that he had the right to be present in his ex-girlfriend's bedroom, even though the homeowner said that the defendant was not inside the home. The defendant has the burden of showing his reasonable expectation of privacy, at least as to the non-possessory crime of murder. Mubdi, supra; Commonwealth v. Pina, 406 Mass. 540, 544 (1990). The defendant cannot challenge the discovery of items found during the search as it applies to the non-possessory offenses charged because there is no possession element in the crime of murder, the defendant was inside the house without the homeowner's knowledge and daughter was not present.

CONCLUSION

For the foregoing reasons, the Commonwealth respectfully requests that this Court reverse the order of suppression.

Respectfully submitted,

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District Attorney

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COMMONWEALTH'S ADDENDUM

NB: This unofficial compilation of the U.S. Code is current as of Jan. 4, 2012 (see http://www.law.cornell.edu/uscode/uscprint.html).

TITLE 18 - CRIMES AND CRIMINAL PROCEDURE
PART I - CRIMES
CHAPTER 121 - STORED WIRE AND ELECTRONIC COMMUNICATIONS AND TRANSACTIONAL RECORDS ACCESS

§ 2702. Voluntary disclosure of customer communications or records

(a) Prohibitions.— Except as provided in subsection (b) or (c)—

(1) a person or entity providing an electronic communication service to the public shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service; and

(2) a person or entity providing remote computing service to the public shall not knowingly divulge to any person or entity the contents of any communication which is carried or maintained on that service—

(A) on behalf of, and received by means of electronic transmission from (or created by means of computer processing of communications received by means of electronic transmission from), a subscriber or customer of such service;

(B) solely for the purpose of providing storage or computer processing services to such subscriber or customer, if the provider is not authorized to access the contents of any such communications for purposes of providing any services other than storage or computer processing; and

(3) a provider of remote computing service or electronic communication service to the public shall not knowingly divulge a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications covered by paragraph (1) or (2)) to any governmental entity.

(b) Exceptions for disclosure of communications.— A provider described in subsection (a) may divulge the contents of a communication—

(1) to an addressee or intended recipient of such communication or an agent of such addressee or intended recipient;

(2) as otherwise authorized in section 2517, 2511 (2)(a), or 2703 of this title;

(3) with the lawful consent of the originator or an addressee or intended recipient of such communication, or the subscriber in the case of remote computing service;

(4) to a person employed or authorized or whose facilities are used to forward such communication to its destination;

(5) as may be necessarily incident to the rendition of the service or to the protection of the rights or property of the provider of that service;

(6) to the National Center for Missing and Exploited Children, in connection with a report submitted thereto under section 2258A;

(7) to a law enforcement agency—

(A) if the contents—

(i) were inadvertently obtained by the service provider; and

(ii) appear to pertain to the commission of a crime; or

[(B) Repealed. Pub. L. 108–21, title V, § 508(b)(1)(A), Apr. 30, 2003, 117 Stat. 684]

(8) to a governmental entity, if the provider, in good faith, believes that an emergency involving danger of death or serious physical injury to any person requires disclosure without delay of communications relating to the emergency.

(c) Exceptions for Disclosure of Customer Records.— A provider described in subsection (a) may divulge a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications covered by subsection (a)(1) or (a)(2))—

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(1) as otherwise authorized in section 2703;

(2) with the lawful consent of the customer or subscriber;

(3) as may be necessarily incident to the rendition of the service or to the protection of the rights or property of the provider of that service;

(4) to a governmental entity, if the provider, in good faith, believes that an emergency involving danger of death or serious physical injury to any person requires disclosure without delay of information relating to the emergency;

(5) to the National Center for Missing and Exploited Children, in connection with a report submitted thereto under section 2258A; or

(6) to any person other than a governmental entity.

(d) Reporting of Emergency Disclosures.— On an annual basis, the Attorney General shall submit to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate a report containing—

(1) the number of accounts from which the Department of Justice has received voluntary disclosures under subsection (b)(8); and

(2) a summary of the basis for disclosure in those instances where—

(A) voluntary disclosures under subsection (b)(8) were made to the Department of Justice; and

(B) the investigation pertaining to those disclosures was closed without the filing of criminal charges.

(Added Pub. L. 99–508, title II, § 201[(a)], Oct. 21, 1986, 100 Stat. 1860; amended Pub. L. 100–690, title VII, § 7037, Nov. 18, 1988, 102 Stat. 4399; Pub. L. 105–314, title VI, § 604(b), Oct. 30, 1998, 112 Stat. 2984; Pub. L. 107–56, title II, § 212(a)(1), Oct. 26, 2001, 115 Stat. 284; Pub. L. 107–296, title II, § 225(d)(1), Nov. 25, 2002, 116 Stat. 2157; Pub. L. 108–21, title V, § 508(b), Apr. 30, 2003, 117 Stat. 684; Pub. L. 109–177, title I, § 107(a), (b)(1), (c), Mar. 9, 2006, 120 Stat. 202, 203; Pub. L. 110–401, title V, § 501(b)(2), Oct. 13, 2008, 122 Stat. 4251.)

Amendments

2008—Subsecs. (b)(6), (c)(5). Pub. L. 110–401 substituted "section 2258A" for "section 227 of the Victims of Child Abuse Act of 1990 (42 U.S.C. 13032)".

2006—Subsec. (a). Pub. L. 109–177, § 107(c), inserted "or (c)" after "Except as provided in subsection (b)".

Subsec. (b)(8). Pub. L. 109–177, § 107(b)(1)(A), struck out "Federal, State, or local" before "governmental entity".

Subsec. (c)(4). Pub. L. 109–177, § 107(b)(1)(B), added par. (4) and struck out former par. (4) which read as follows: "to a governmental entity, if the provider reasonably believes that an emergency involving immediate danger of death or serious physical injury to any person justifies disclosure of the information;".

Subsec. (d). Pub. L. 109–177, § 107(a), added subsec. (d).

2003—Subsec. (b)(5). Pub. L. 108–21, § 508(b)(1)(C), which directed amendment of par. (5) by striking "or" at the end, could not be executed because "or" did not appear at the end. See 2002 Amendment note below.

Subsec. (b)(6). Pub. L. 108–21, § 508(b)(1)(D), added par. (6). Former par. (6) redesignated (7).

Subsec. (b)(6)(B). Pub. L. 108–21, § 508(b)(1)(A), struck out subpar. (B) which read as follows: "if required by section 227 of the Crime Control Act of 1990; or".

Subsec. (b)(7), (8). Pub. L. 108–21, § 508(b)(1)(B), redesignated pars. (6) and (7) as (7) and (8), respectively.

Subsec. (c)(5), (6). Pub. L. 108–21, § 508(b)(2), added par. (5) and redesignated former par. (5) as (6).

2002—Subsec. (b)(5). Pub. L. 107–296, § 225(d)(1)(A), struck out "or" at end.

Subsec. (b)(6)(A). Pub. L. 107–296, § 225(d)(1)(B), inserted "or" at end.

Subsec. (b)(6)(C). Pub. L. 107–296, § 225(d)(1)(C), struck out subpar. (C) which read as follows: "if the provider reasonably believes that an emergency involving immediate danger of death or serious physical injury to any person requires disclosure of the information without delay."

Subsec. (b)(7). Pub. L. 107–296, § 225(d)(1)(D), added par. (7).

2001—Pub. L. 107–56, § 212(a)(1)(A), substituted "Voluntary disclosure of customer communications or records" for "Disclosure of contents" in section catchline.

Subsec. (a)(3). Pub. L. 107–56, § 212(a)(1)(B), added par. (3).

Subsec. (b). Pub. L. 107–56, § 212(a)(1)(C), substituted "Exceptions for disclosure of communications" for "Exceptions" in heading and "A provider described in subsection (a)" for "A person or entity" in introductory provisions.

Subsec. (b)(6)(C). Pub. L. 107–56, § 212(a)(1)(D), added subpar. (C).

Subsec. (c). Pub. L. 107–56, § 212(a)(1)(E), added subsec. (c).

1998—Subsec. (b)(6). Pub. L. 105–314 amended par. (6) generally. Prior to amendment, par. (6) read as follows: "to a law enforcement agency, if such contents—

"(A) were inadvertently obtained by the service provider; and

"(B) appear to pertain to the commission of a crime."

1988—Subsec. (b)(2). Pub. L. 100–690 substituted "2517" for "2516".

Effective Date of 2002 Amendment

Amendment by Pub. L. 107–296 effective 60 days after Nov. 25, 2002, see section 4 of Pub. L. 107–296, set out as an Effective Date note under section 101 of Title 6, Domestic Security.

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NB: This unofficial compilation of the U.S. Code is current as of Jan. 4, 2012 (see http://www.law.cornell.edu/uscode/uscprint.html).

TITLE 18 - CRIMES AND CRIMINAL PROCEDURE
PART I - CRIMES
CHAPTER 121 - STORED WIRE AND ELECTRONIC COMMUNICATIONS AND TRANSACTIONAL RECORDS ACCESS

§ 2703. Required disclosure of customer communications or records

(a) Contents of Wire or Electronic Communications in Electronic Storage.— A governmental entity may require the disclosure by a provider of electronic communication service of the contents of a wire or electronic communication, that is in electronic storage in an electronic communications system for one hundred and eighty days or less, only pursuant to a warrant issued using the procedures described in the Federal Rules of Criminal Procedure (or, in the case of a State court, issued using State warrant procedures) by a court of competent jurisdiction. A governmental entity may require the disclosure by a provider of electronic communications services of the contents of a wire or electronic communication that has been in electronic storage in an electronic communications system for more than one hundred and eighty days by the means available under subsection (b) of this section.

(b) Contents of Wire or Electronic Communications in a Remote Computing Service.—

(1) A governmental entity may require a provider of remote computing service to disclose the contents of any wire or electronic communication to which this paragraph is made applicable by paragraph (2) of this subsection—

(A) without required notice to the subscriber or customer, if the governmental entity obtains a warrant issued using the procedures described in the Federal Rules of Criminal Procedure (or, in the case of a State court, issued using State warrant procedures) by a court of competent jurisdiction; or

(B) with prior notice from the governmental entity to the subscriber or customer if the governmental entity—

(i) uses an administrative subpoena authorized by a Federal or State statute or a Federal or State grand jury or trial subpoena; or

(ii) obtains a court order for such disclosure under subsection (d) of this section;

except that delayed notice may be given pursuant to section 2705 of this title.

(2) Paragraph (1) is applicable with respect to any wire or electronic communication that is held or maintained on that service—

(A) on behalf of, and received by means of electronic transmission from (or created by means of computer processing of communications received by means of electronic transmission from), a subscriber or customer of such remote computing service; and

(B) solely for the purpose of providing storage or computer processing services to such subscriber or customer, if the provider is not authorized to access the contents of any such communications for purposes of providing any services other than storage or computer processing.

(c) Records Concerning Electronic Communication Service or Remote Computing Service.—

(1) A governmental entity may require a provider of electronic communication service or remote computing service to disclose a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications) only when the governmental entity—

(A) obtains a warrant issued using the procedures described in the Federal Rules of Criminal Procedure (or, in the case of a State court, issued using State warrant procedures) by a court of competent jurisdiction;

(B) obtains a court order for such disclosure under subsection (d) of this section;

(C) has the consent of the subscriber or customer to such disclosure;

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(D) submits a formal written request relevant to a law enforcement investigation concerning telemarketing fraud for the name, address, and place of business of a subscriber or customer of such provider, which subscriber or customer is engaged in telemarketing (as such term is defined in section 2325 of this title); or

(E) seeks information under paragraph (2).

(2) A provider of electronic communication service or remote computing service shall disclose to a governmental entity the—

(A) name;

(B) address;

(C) local and long distance telephone connection records, or records of session times and durations;

(D) length of service (including start date) and types of service utilized;

(E) telephone or instrument number or other subscriber number or identity, including any temporarily assigned network address; and

(F) means and source of payment for such service (including any credit card or bank account number),

of a subscriber to or customer of such service when the governmental entity uses an administrative subpoena authorized by a Federal or State statute or a Federal or State grand jury or trial subpoena or any means available under paragraph (1).

(3) A governmental entity receiving records or information under this subsection is not required to provide notice to a subscriber or customer.

(d) Requirements for Court Order.— A court order for disclosure under subsection (b) or (c) may be issued by any court that is a court of competent jurisdiction and shall issue only if the governmental entity offers specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation. In the case of a State governmental authority, such a court order shall not issue if prohibited by the law of such State. A court issuing an order pursuant to this section, on a motion made promptly by the service provider, may quash or modify such order, if the information or records requested are unusually voluminous in nature or compliance with such order otherwise would cause an undue burden on such provider.

(e) No Cause of Action Against a Provider Disclosing Information Under This Chapter.— No cause of action shall lie in any court against any provider of wire or electronic communication service, its officers, employees, agents, or other specified persons for providing information, facilities, or assistance in accordance with the terms of a court order, warrant, subpoena, statutory authorization, or certification under this chapter.

(f) Requirement To Preserve Evidence.—

(1) In general.— A provider of wire or electronic communication services or a remote computing service, upon the request of a governmental entity, shall take all necessary steps to preserve records and other evidence in its possession pending the issuance of a court order or other process.

(2) Period of retention.— Records referred to in paragraph (1) shall be retained for a period of 90 days, which shall be extended for an additional 90-day period upon a renewed request by the governmental entity.

(g) Presence of Officer Not Required.— Notwithstanding section 3105 of this title, the presence of an officer shall not be required for service or execution of a search warrant issued in accordance with this chapter requiring disclosure by a provider of electronic communications service or remote computing service of the contents of communications or records or other information pertaining to a subscriber to or customer of such service.

(Added Pub. L. 99–508, title II, § 201[(a)], Oct. 21, 1986, 100 Stat. 1861; amended Pub. L. 100–690, title VII, §§ 7038, 7039, Nov. 18, 1988, 102 Stat. 4399; Pub. L. 103–322, title XXXIII, § 330003(b), Sept. 13, 1994, 108 Stat. 2140; Pub. L. 103–414, title II, § 207(a), Oct. 25, 1994, 108 Stat. 4292; Pub. L. 104–132, title VIII, § 804, Apr. 24, 1996, 110 Stat. 1305; Pub. L. 104–293, title VI, § 601(b), Oct. 11, 1996, 110 Stat. 3469; Pub. L. 104–294, title VI, § 605(f), Oct. 11, 1996, 110 Stat. 3510; Pub. L. 105–184, § 8, June 23, 1998, 112 Stat. 522; Pub. L. 107–56, title II, §§ 209(2), 210, 212 (b)(1), 220 (a)(1), (b), Oct. 26, 2001, 115 Stat. 283, 285, 291, 292; Pub. L. 107–273, div. B, title IV, § 4005(a)(2), div. C, title I, § 11010, Nov. 2, 2002, 116 Stat. 1812, 1822; Pub. L. 107–296, title II, § 225(h)(1), Nov. 25, 2002, 116 Stat. 2158; Pub. L. 109–162, title XI, § 1171(a)(1), Jan. 5, 2006, 119 Stat. 3123; Pub. L. 111–79, § 2(1), Oct. 19, 2009, 123 Stat. 2086.)

References in Text

The Federal Rules of Criminal Procedure, referred to in subsecs. (a), (b)(1)(A), and (c)(1)(B)(i), are set out in the Appendix to this title.

Amendments

2009—Subsecs. (a), (b)(1)(A), (c)(1)(A). Pub. L. 111–79, which directed substitution of "(or, in the case of a State court, issued using State warrant procedures) by a court of competent jurisdiction" for "by a court with jurisdiction over the offense under investigation or an equivalent State warrant", was executed by making the substitution for "by a court with jurisdiction over the offense under investigation or equivalent State warrant" to reflect the probable intent of Congress.

2006—Subsec. (c)(1)(C). Pub. L. 109–162 struck out "or" at end.

2002—Subsec. (c)(1)(E). Pub. L. 107–273, § 4005(a)(2), realigned margins.

Subsec. (e). Pub. L. 107–296 inserted ", statutory authorization" after "subpoena".

Subsec. (g). Pub. L. 107–273, § 11010, added subsec. (g).

2001—Pub. L. 107–56, § 212(b)(1)(A), substituted "Required disclosure of customer communications or records" for "Requirements for governmental access" in section catchline.

Subsec. (a). Pub. L. 107–56, §§ 209(2)(A), (B), 220 (a)(1), substituted "Contents of Wire or Electronic" for "Contents of Electronic" in heading and "contents of a wire or electronic" for "contents of an electronic" in two places and "using the procedures described in the Federal Rules of Criminal Procedure by a court with jurisdiction over the offense under investigation" for "under the Federal Rules of Criminal Procedure" in text.

Subsec. (b). Pub. L. 107–56, § 209(2)(A), substituted "Contents of Wire or Electronic" for "Contents of Electronic" in heading.

Subsec. (b)(1). Pub. L. 107–56, §§ 209(2)(C), 220 (a)(1), substituted "any wire or electronic communication" for "any electronic communication" in introductory provisions and "using the procedures described in the Federal Rules of Criminal Procedure by a court with jurisdiction over the offense under investigation" for "under the Federal Rules of Criminal Procedure" in subpar. (A).

Subsec. (b)(2). Pub. L. 107–56, § 209(2)(C), substituted "any wire or electronic communication" for "any electronic communication" in introductory provisions.

Subsec. (c)(1). Pub. L. 107–56, §§ 212(b)(1)(C), 220 (a)(1), designated subpar. (A) and introductory provisions of subpar. (B) as par. (1), substituted "A governmental entity may require a provider of electronic communication service or remote computing service to" for "(A) Except as provided in subparagraph (B), a provider of electronic communication service or remote computing service may" and a closing parenthesis for provisions which began with "covered by subsection (a) or (b) of this section) to any person other than a governmental entity." in former subpar. (A) and ended with "(B) A provider of electronic communication service or remote computing service shall disclose a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications covered by subsection (a) or (b) of this section) to a governmental entity", redesignated clauses (i) to (iv) of former subpar. (B) as subpars. (A) to (D), respectively, substituted "using the procedures described in the Federal Rules of Criminal Procedure by a court with jurisdiction over the offense under investigation" for "under the Federal Rules of Criminal Procedure" in subpar. (A) and "; or" for period at end of subpar. (D), added subpar. (E), and redesignated former subpar. (C) as par. (2).

Subsec. (c)(2). Pub. L. 107–56, § 210, amended par. (2), as redesignated by section 212 of Pub. L. 107–56, by substituting "entity the—" for "entity the name, address, local and long distance telephone toll billing records,

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telephone number or other subscriber number or identity, and length of service of a subscriber" in introductory provisions, inserting subpars. (A) to (F), striking out "and the types of services the subscriber or customer utilized," before "when the governmental entity uses an administrative subpoena", inserting "of a subscriber" at beginning of concluding provisions and designating "to or customer of such service when the governmental entity uses an administrative subpoena authorized by a Federal or State statute or a Federal or State grand jury or trial subpoena or any means available under paragraph (1)." as remainder of concluding provisions.

Pub. L. 107–56, § 212(b)(1)(C)(iii), (D), redesignated subpar. (C) of par. (1) as par. (2) and temporarily substituted "paragraph (1)" for "subparagraph (B)".

Pub. L. 107–56, § 212(b)(1)(B), redesignated par. (2) as (3).

Subsec. (c)(3). Pub. L. 107–56, § 212(b)(1)(B), redesignated par. (2) as (3).

Subsec. (d). Pub. L. 107–56, § 220(b), struck out "described in section 3127 (2)(A)" after "court of competent jurisdiction".

1998—Subsec. (c)(1)(B)(iv). Pub. L. 105–184 added cl. (iv).

1996—Subsec. (c)(1)(C). Pub. L. 104–293 inserted "local and long distance" after "address,".

Subsec. (d). Pub. L. 104–294 substituted "in section 3127 (2)(A)" for "in section 3126 (2)(A)".

Subsec. (f). Pub. L. 104–132 added subsec. (f).

1994—Subsec. (c)(1)(B). Pub. L. 103–414, § 207(a)(1)(A), redesignated cls. (ii) to (iv) as (i) to (iii), respectively, and struck out former cl. (i) which read as follows: "uses an administrative subpoena authorized by a Federal or State statute, or a Federal or State grand jury or trial subpoena;".

Subsec. (c)(1)(C). Pub. L. 103–414, § 207(a)(1)(B), added subpar. (C).

Subsec. (d). Pub. L. 103–414, § 207(a)(2), amended first sentence generally. Prior to amendment, first sentence read as follows: "A court order for disclosure under subsection (b) or (c) of this section may be issued by any court that is a court of competent jurisdiction set forth in section 3127 (2)(A) of this title and shall issue only if the governmental entity shows that there is reason to believe the contents of a wire or electronic communication, or the records or other information sought, are relevant to a legitimate law enforcement inquiry."

Pub. L. 103–322 substituted "section 3127 (2)(A)" for "section 3126 (2)(A)".

1988—Subsecs. (b)(1)(B)(i), (c)(1)(B)(i). Pub. L. 100–690, § 7038, inserted "or trial" after "grand jury".

Subsec. (d). Pub. L. 100–690, § 7039, inserted "may be issued by any court that is a court of competent jurisdiction set forth in section 3126 (2)(A) of this title and" before "shall issue".

Effective Date of 2002 Amendment

Amendment by Pub. L. 107–296 effective 60 days after Nov. 25, 2002, see section 4 of Pub. L. 107–296, set out as an Effective Date note under section 101 of Title 6, Domestic Security.

Part IV CRIMES, PUNISHMENTS AND PROCEEDINGS IN CRIMINAL CASES

Title I CRIMES AND PUNISHMENTS

Chapter 265 CRIMES AGAINST THE PERSON

Section 1 MURDER DEFINED

Section 1. Murder committed with deliberately premeditated malice aforethought, or with extreme atrocity or cruelty, or in the commission or attempted commission of a crime punishable with death or imprisonment for life, is murder in the first degree. Murder which does not appear to be in the first degree is murder in the second degree. Petit treason shall be prosecuted and punished as murder. The degree of murder shall be found by the jury.

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Part IV CRIMES, PUNISHMENTS AND PROCEEDINGS IN CRIMINAL CASES

Title I CRIMES AND PUNISHMENTS

Chapter 265 CRIMES AGAINST THE PERSON

Section 15A ASSAULT AND BATTERY WITH DANGEROUS WEAPON; VICTIM SIXTY OR OLDER; PUNISHMENT; SUBSEQUENT OFFENSES

Section 15A. (a) Whoever commits assault and battery upon a person sixty years or older by means of a dangerous weapon shall be punished by imprisonment in the state prison for not more than ten years or by a fine of not more than one thousand dollars or imprisonment in jail for not more than two and one-half years.

Whoever, after having been convicted of the crime of assault and battery upon a person sixty years or older, by means of a dangerous weapon, commits a second or subsequent such crime, shall be punished by imprisonment for not less than two years. Said sentence shall not be reduced until two years of said sentence have been served nor shall the person convicted be eligible for probation, parole, furlough, work release or receive any deduction

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from his sentence for good conduct until he shall have served two years of such sentence; provided, however, that the commissioner of correction may, on the recommendation of the warden, superintendent, or other person in charge of a correctional institution, or the administrator of a county correctional institution, grant to said offender a temporary release in the custody of an officer of such institution for the following purposes only: to attend the funeral of next of kin or spouse; to visit a critically ill close relative or spouse; or to obtain emergency medical services unavailable at said institution. The provisions of section eighty-seven of chapter two hundred and seventy-six relating to the power of the court to place certain offenders on probation shall not apply to any person 18 years of age or over charged with a violation of this subsection.

(b) Whoever commits an assault and battery upon another by means of a dangerous weapon shall be punished by imprisonment in the state prison for not more than 10 years or in the house of correction for not more than 21/2 years, or by a fine of not more than $5,000, or by both such fine and imprisonment.

(c) Whoever:

(i) by means of a dangerous weapon, commits an assault and battery upon another and by such assault and battery causes serious bodily injury;

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(ii) by means of a dangerous weapon, commits an assault and battery upon another who is pregnant at the time of such assault and battery, knowing or having reason to know that the person is pregnant;

(iii) by means of a dangerous weapon, commits an assault and battery upon another who he knows has an outstanding temporary or permanent vacate, restraining or no contact order or judgment issued pursuant to section 18, section 34B or section 34C of chapter 208, section 32 of chapter 209, section 3, 4 or 5 of chapter 209A, or section 15 or 20 of chapter 209C, in effect against him at the time of such assault and battery; or

(iv) is 18 years of age or older and, by means of a dangerous weapon, commits an assault and battery upon a child under the age of 14;

shall be punished by imprisonment in the state prison for not more than 15 years or in the house of correction for not more than 21/2 years, or by a fine of not more than $10,000, or by both such fine and imprisonment.

(d) For the purposes of this section, "serious bodily injury" shall mean bodily injury which results in a permanent disfigurement, loss or impairment of a bodily function, limb or organ, or a substantial risk of death.

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Part IV CRIMES, PUNISHMENTS AND PROCEEDINGS IN CRIMINAL CASES

Title I CRIMES AND PUNISHMENTS

Chapter 265 CRIMES AGAINST THE PERSON

Section 18 ASSAULT WITH INTENT TO ROB OR MURDER; WEAPONS; PUNISHMENT; VICTIM SIXTY YEARS OR OLDER; MINIMUM SENTENCE FOR REPEAT OFFENDERS

Section 18. (a) Whoever, being armed with a dangerous weapon, assaults a person sixty years or older with intent to rob or murder shall be punished by imprisonment in the state prison for not more than twenty years. Whoever commits any offense described herein while armed with a firearm, shotgun, rifle, machine gun or assault weapon shall be punished by imprisonment in the state prison for not less than ten years.

Whoever, after having been convicted of the crime of assault upon a person sixty years or older with intent to rob or murder while being armed with a dangerous weapon, commits a second or subsequent such crime, shall be punished by imprisonment for not less than two years. Said sentence shall not be reduced until two

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years of said sentence have been served nor shall the person convicted be eligible for probation, parole, furlough, work release or receive any deduction from his sentence for good conduct until he shall have served two years of such sentence; provided, however, that the commissioner of correction may, on the recommendation of the warden, superintendent, or other person in charge of a correctional institution, or the administrator of a county correctional institution, grant to said offender a temporary release in the custody of an officer of such institution for the following purposes only: to attend the funeral of next of kin or spouse; to visit a critically ill close relative or spouse; or to obtain emergency medical services unavailable at said institution. The provisions of section eighty-seven of chapter two hundred and seventy-six relating to the power of the court to place certain offenders on probation shall not apply to any person 18 years of age or over charged with a violation of this subsection. Whoever, after having been convicted of the crime of assault upon a person 60 years or older with intent to rob or murder while armed with a firearm, shotgun, rifle, machine gun or assault weapon commits a second or subsequent such crime shall be punished by imprisonment in the state prison for not less than 20 years.

(b) Whoever, being armed with a dangerous weapon, assaults another with intent to rob or murder shall be punished by imprisonment in the state prison for not more than twenty years. Whoever, being armed with a firearm, shotgun, rifle, machine gun

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or assault weapon assaults another with intent to rob or murder shall be punished by imprisonment in state prison for not less than five years and not more than 20 years.

Part IV CRIMES, PUNISHMENTS AND PROCEEDINGS IN CRIMINAL CASES

Title I CRIMES AND PUNISHMENTS

Chapter 268 CRIMES AGAINST PUBLIC JUSTICE

Section 13B INTIMIDATION OF WITNESSES, JURORS AND PERSONS FURNISHING INFORMATION IN CONNECTION WITH CRIMINAL PROCEEDINGS

Section 13B. (1) Whoever, directly or indirectly, willfully

(a) threatens, or attempts or causes physical injury, emotional injury, economic injury or property damage to;

(b) conveys a gift, offer or promise of anything of value to; or

(c) misleads, intimidates or harasses another person who is:

(i) a witness or potential witness at any stage of a criminal investigation, grand jury proceeding, trial or other criminal proceeding of any type;

(ii) a person who is or was aware of information, records, documents or objects that relate to a violation of a criminal statute, or a violation of conditions of probation, parole or bail;

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(iii) a judge, juror, grand juror, prosecutor, police officer, federal agent, investigator, defense attorney, clerk, court officer, probation officer or parole officer;

(iv) a person who is furthering a civil or criminal proceeding, including criminal investigation, grand jury proceeding, trial, other criminal proceeding of any type, probate and family proceeding, juvenile proceeding, housing proceeding, land proceeding, clerk's hearing, court ordered mediation, any other civil proceeding of any type; or

(v) a person who is or was attending or had made known his intention to attend a civil or criminal proceeding, including criminal investigation, grand jury proceeding, trial, other criminal proceeding of any type, probate and family proceeding, juvenile proceeding, housing proceeding, land proceeding, clerk's hearing, court-ordered mediation, any other civil proceeding of any type with the intent to impede, obstruct, delay, harm, punish or otherwise interfere thereby, or do so with reckless disregard, with such a proceeding shall be punished by imprisonment in a jail or house of correction for not more than 2 and one-half years or by imprisonment in a state prison for not more than 10 years, or by a fine of not less than $1,000 nor more than $5,000, or by both such fine and imprisonment.

(2) As used in this section, "investigator" shall mean an individual or group of individuals lawfully authorized by a department or agency of the federal government, or any political subdivision

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thereof, or a department or agency of the commonwealth, or any political subdivision thereof, to conduct or engage in an investigation of, prosecution for, or defense of a violation of the laws of the United States or of the commonwealth in the course of his official duties.

(3) As used in this section, "harass" shall mean to engage in any act directed at a specific person or persons, which act seriously alarms or annoys such person or persons and would cause a reasonable person to suffer substantial emotional distress. Such act shall include, but not be limited to, an act conducted by mail or by use of a telephonic or telecommunication device or electronic communication device including but not limited to any device that transfers signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photo-electronic or photo-optical system, including, but not limited to, electronic mail, internet communications, instant messages or facsimile communications.

(4) A prosecution under this section may be brought in the county in which the criminal investigation, grand jury proceeding, trial or other criminal proceeding is being conducted or took place, or in the county in which the alleged conduct constituting an offense occurred.

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Mass. G.L. c. 269, Section 10: Carrying dangerous weapons; possession of machine gun or sawed-off shotguns; possession of large capacity weapon or large capacity feeding device; punishment

(c) Whoever, except as provided by law, possesses a machine gun, as defined in section one hundred and twenty-one of chapter one hundred and forty, without permission under section one hundred and thirty-one of said chapter one hundred and forty; or whoever owns, possesses or carries on his person, or carries on his person or under his control in a vehicle, a sawed-off shotgun, as defined in said section one hundred and twenty-one of said chapter one hundred and forty, shall be punished by imprisonment in the state prison for life, or for any term of years provided that any sentence imposed under the provisions of this paragraph shall be subject to the minimum requirements of paragraph (a).

(h)(1) Whoever owns, possesses or transfers a firearm, rifle, shotgun or ammunition without complying with the provisions of section 129C of chapter 140 shall be punished by imprisonment in a jail or house of correction for not more than 2 years or by a fine of not more than $500. Whoever commits a second or subsequent violation of this paragraph shall be punished by imprisonment in a house of correction for not more than 2 years or by a fine of not more than $1,000, or both. Any officer authorized to make arrests may arrest without a warrant any person whom the officer has probable cause to believe has violated this paragraph.

Rule 15. INTERLOCUTORY APPEAL

(Applicable to District Court and Superior Court)

(a) Right of Interlocutory Appeal.

(2) Right of Appeal Where Motion to Suppress Evidence Determined. A defendant or the Commonwealth shall have the right and opportunity to apply to a single justice of the Supreme Judicial Court for leave to appeal an order determining a motion to suppress evidence prior to trial. If the single justice determines that the administration of justice would be facilitated, the justice may grant that leave and may hear the appeal or may report it to the full Supreme Judicial Court or to the Appeals Court.

CERTIFICATE PURSUANT TO MASS. R. APP. P. 16(k)

I, Jessica L. Kenny, do hereby certify that the Commonwealth's brief in the case of Commonwealth v. Jerome Almonor, Appeals Court No. 2017-P-0494, complies with Mass. R. App. P. 16(k).

Jessica L. Kenny
Assistant District Attorney
For the Plymouth District
BBO # 667738

Date: September 21, 2017

CERTIFICATE OF SERVICE

I, Jessica L. Kenny, hereby certify that I have this date, September 21, 2017, served a copy of the Commonwealth's brief RE: Commonwealth v. Jerome Almonor, Appeals Court No. 2017-P-0494, on counsel for the defendant by mailing to the office of Randal K. Power, Esquire, 400 Trade Center, Suite 5900, Woburn, MA 01801.

Signed under the pains and penalties of perjury.

Jessica L. Kenny

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